

**Letter of Findings: 04-20160542  
Use Tax  
For the Year 2015**

**NOTICE:** IC § 6-8.1-3-3.5 and IC § 4-22-7-7 requires the publication of this document in the Indiana Register. This document provides the general public with information about the Department's official position concerning a specific set of facts and issues. This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register. The "Holding" section of this document is provided for the convenience of the reader and is not part of the analysis contained in this Letter of Findings.

### HOLDING

Individual could not demonstrate that he did not owe use tax on the use of an RV in Indiana.

### ISSUES

#### I. Use Tax—Recreational Vehicle.

**Authority:** IC § 6-2.5-2-1; IC § 6-2.5-3-2; IC § 6-8.1-5-1; Lafayette Square Amoco, Inc. v. Ind. Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); Ind. Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463 (Ind. 2012); Scopelite v. Ind. Dep't of Local Gov't Fin., 939 N.E.2d 1138 (Ind. Tax Ct. 2010); Wendt LLP v. Ind. Dep't of State Revenue, 977 N.E.2d 480 (Ind. Tax Ct. 2012); Gregory v. Helvering, 293 U.S. 465 (1935); Comm'r v. Transp. Trading & Terminal Corp., 176 F.2d 570 (2nd Cir. 1949); Horn v. Comm'r, 968 F.2d 1229 (D.C. Cir. 1992); Lee v. Comm'r, 155 F.3d 584 (2nd Cir. 1998); [45 IAC 2.2-3-4](#).

Taxpayer protests the imposition of use tax on the use of a recreational vehicle.

#### II. Tax Administration—Penalty.

**Authority:** IC § 6-8.1-10-2.1; [45 IAC 15-11-2](#).

Taxpayer protests the imposition of penalty.

### STATEMENT OF FACTS

Taxpayer is a resident of Indiana. The Indiana Department of Revenue ("Department") determined that on June 4, 2015, Taxpayer purchased a recreational vehicle ("RV") in Indiana and had been using the RV in Indiana and other states without paying sales tax in any jurisdiction. As a result, the Department issued proposed assessments for Indiana use tax, negligence penalty, and interest. Taxpayer protests that the RV was titled by a Montana LLC ("LLC"), that the RV mostly remained outside of Indiana, and that no Indiana use tax is due. An administrative hearing was conducted and this Letter of Findings results. Further facts will be provided as required.

#### I. Use Tax—Recreational Vehicle.

### DISCUSSION

As a threshold issue, all tax assessments are prima facie evidence that the Department's claim for the unpaid tax is valid; the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(c); Lafayette Square Amoco, Inc. v. Ind. Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007); Ind. Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463, 466 (Ind. 2012). Thus, the taxpayer is required to provide documentation explaining and supporting his challenge that the Department's assessment is wrong. Poorly developed and non-cogent arguments are subject to waiver. Scopelite v. Ind. Dep't of Local Gov't Fin., 939 N.E.2d 1138, 1145 (Ind. Tax Ct. 2010); Wendt LLP v. Ind. Dep't of State Revenue, 977 N.E.2d 480, 486 n.9 (Ind. Tax Ct. 2012).

Taxpayer protests the imposition of use tax on the use and storage of the RV in Indiana. The Department imposed use tax after determining that Taxpayer had been using and storing the RV in Indiana and that no sales

tax had been paid on the purchase of the RV. Taxpayer protests that the RV was titled by a Montana LLC and that all legal documents establishing the existence of the LLC were properly filed in Montana.

The sales tax is imposed by IC § 6-2.5-2-1, which states:

- (a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.
- (b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state.

The use tax is imposed under IC § 6-2.5-3-2(a), which states:

- (a) An excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction.

Also, [45 IAC 2.2-3-4](#) provides:

Tangible personal property, purchased in Indiana, or elsewhere in a retail transaction, and stored, used, or otherwise consumed in Indiana is subject to Indiana use tax for such property, unless the Indiana state gross retail tax has been collected at the point of purchase.

Therefore, when tangible personal property is acquired in a retail transaction and is stored, used, or consumed in Indiana, Indiana use tax is due if sales tax has not been paid at the point of purchase. The Department determined that Taxpayer purchased the RV in Indiana in a retail transaction on June 4, 2015, and as a resident of Indiana, stored or used the RV in Indiana but did not pay sales tax anywhere. The Department therefore issued proposed assessments for use tax.

Taxpayer states that LLC's legal documents were properly filed by a Montana attorney. Taxpayer also states that the RV is used by members of LLC for business purposes.

Section 2 of the LLC's Articles of Organization (dated June 6, 2005) provided:

The Company is primarily involved in the business of investing in real and personal property in Montana and in any other lawful business upon which the Member owning a Majority of the company percentages may agree.

Also, the RV sales invoice and its insurance document establish that the address Taxpayer uses is the same as Taxpayer's Montana attorney's office. Furthermore, Taxpayer does not own any property or building in Montana.

There are no LLC documents establishing any business activity in Indiana, Montana, or any other state. Although Taxpayer provided a lease agreement for the RV, the agreement is a lease for sale of a second asset of the LLC. Taxpayer also provided sale listings of the RV in question on multiple websites. Taxpayer also claimed that it attempted to pursue a business in antiques or building log cabins, however no documentation was provided to substantiate Taxpayer actually conducting any business activity. Plainly, the LLC was not pursuing a business purpose. The sole activity of the Montana LLC was to hold title to the RV.

While the Montana LLC made no attempt to undertake any business activity, the titling of the RV by the LLC did have a significant impact on Taxpayer's sales taxes. This leads to consideration of the "sham transaction" doctrine, which is long established both in state and federal tax jurisprudence dating back to *Gregory v. Helvering*, 293 U.S. 465 (1935). In that case, the Court held that in order to qualify for favorable tax treatment, a corporate reorganization must be motivated by the furtherance of a legitimate corporate business purpose. *Id.* at 469. A corporate business activity undertaken merely for the purpose of avoiding taxes was without substance and "[T]o hold otherwise would be to exalt artifice above reality and to deprive the statutory provision in question of all serious purpose." *Id.* at 470.

The courts have subsequently held that "in construing words of a tax statute which describe [any] commercial transactions [the court is] to understand them to refer to transactions entered upon for commercial or industrial purposes and not to include transactions entered upon for no other motive but to escape taxation." *Comm'r v. Transp. Trading & Terminal Corp.*, 176 F.2d 570, 572 (2nd Cir. 1949), cert. denied, 338 U.S. 955 (1950). "[T]ransactions that are invalidated by the [sham transaction] doctrine are those motivated by nothing other than

the taxpayer's desire to secure the attached tax benefit" but are devoid of any economic substance. *Horn v. Comm'r*, 968 F.2d 1229, 1236-7 (D.C. Cir. 1992). In determining whether a business transaction was an economic sham, two factors can be considered; "(1) did the transaction have a reasonable prospect, ex ante, for economic gain (profit), and (2) was the transaction undertaken for a business purpose other than the tax benefits?" *Id.* at 1237. The question of whether or not a transaction is a sham, for purposes of the doctrine, is primarily a factual one. *Lee v. Comm'r*, 155 F.3d 584, 586 (2nd Cir. 1998).

In this case, the facts are that the officially stated purpose of the LLC's formation was to purchase and own the RV, the Montana LLC neither had business functions, nor attempted to conduct any business of any kind. The titling of the RV in Montana, a state without a sales tax, was merely an attempt to reduce or eliminate Taxpayer's sales and use tax liabilities. The formation of the LLC and the titling of the RV in the name of the LLC was therefore a "sham transaction."

Indiana therefore, is not required to recognize the titling of the RV by LLC and may consider that Taxpayer, who owns both the RV and LLC, was the true purchaser and user of the RV. Since Taxpayer is an Indiana resident and purchased the RV in Indiana, Taxpayer should have paid sales tax at the time of purchase. Having not paid sales tax, Taxpayer now owes use tax. Taxpayer's statements, documentation, and provided timeline show that the RV was stored and used in Indiana, thereby subjecting the purchase price of the RV to Indiana use tax, as provided by IC § 6-2.5-3-2(a). Taxpayer provided the purchase invoice of the RV showing the actual purchase price of \$31,811 which is the price in which use tax will be owed by Taxpayer.

In conclusion, the formation of the LLC and the titling of the RV by the LLC was a sham transaction. Taxpayer acquired tangible personal property in a retail transaction, used and stored it in Indiana, but did not pay sales tax at the point of purchase or anywhere else. In such circumstances, Indiana use tax is due, as explained by [45 IAC 2.2-3-4](#).

## FINDING

Taxpayer's protest is respectfully denied.

## II. Tax Administration - Penalty.

## DISCUSSION

Taxpayer requested that the Department abate the negligence penalty.

Pursuant to IC § 6-8.1-10-2.1(a), the Department may assess a negligence penalty if the taxpayer:

- (1) fails to file a return for any of the listed taxes;
- (2) fails to pay the full amount of tax shown on the person's return on or before the due date for the return or payment;
- (3) incurs, upon examination by the department, a deficiency that is due to negligence;
- (4) fails to timely remit any tax held in trust for the state; or
- (5) is required to make a payment by electronic funds transfer (as defined in [IC 4-8.1-2-7](#)), overnight courier, or personal delivery and the payment is not received by the department by the due date in funds acceptable to the department.

[45 IAC 15-11-2](#)(b) further states:

"Negligence" on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

The Department may waive a negligence penalty when "the taxpayer affirmatively establishes that the failure . . . was due to reasonable cause and not due to negligence." [45 IAC 15-11-2](#)(c). The taxpayer "must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section." *Id.* The Department is mindful that "[r]easonable cause is a fact sensitive

question and thus will be dealt with according to the particular facts and circumstances of each case." Id.

In this instance, Taxpayer has not demonstrated that his actions were reasonable as described in [45 IAC 15-11-2\(c\)](#). Thus, Taxpayer's request for penalty abatement is denied.

#### **FINDING**

Taxpayer's protest of the negligence penalty is denied.

#### **CONCLUSION**

Taxpayer's protest of use tax and negligence penalty is denied.

*Posted: 03/29/2017 by Legislative Services Agency*

An [html](#) version of this document.